NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-1108

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 04, 2017
DEBORAH S. HUNT, Clerk

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	ON APPEAL FOR
	)	ENFORCEMENT OF AN ORDER
MASONIC TEMPLE ASSOCIATION OF	)	OF THE NATIONAL LABOR
DETROIT; 450 TEMPLE, INC., a single employer,	)	RELATIONS BOARD
	)	
Respondents.	)	

O R D E R

Before: CLAY, McKEAGUE, and DONALD, Circuit Judges.

The National Labor Relations Board ("NLRB") petitions for enforcement of an order finding the Masonic Temple Association of Detroit ("MTA") and 450 Temple, Inc. ("450 Temple") (collectively, "the Companies"), in violation of §§ 8(a)(1) and (5) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

MTA and 450 Temple operate Detroit's Masonic Temple ("the Temple"). Since at least 1968, Local 324, International Union of Operating Engineers, AFL-CIO ("the Union"), or its predecessor have represented maintenance engineers, boiler operators, and operating engineers working at the Temple. Over the years, these employees entered into collective-bargaining agreements ("CBAs") with various Temple operators. In 2007, Olympia Entertainment, then a Temple operator and employer of bargaining unit employees, entered into a CBA with the Union effective January 1, 2008 through December 31, 2009. After Olympia Entertainment ended its

relationship with the Temple on December 1, 2010, MTA resumed operations of the Temple and Olympia Entertainment's bargaining unit employees became employees of MTA.

In December 2010, the Temple's general manager, Steven Genther, told a bargaining unit employee that the Companies' president, Roger Sobran, planned to suspend or refuse to recognize the Union. Shortly thereafter, the Union's business representative, James Arini, spoke briefly with Genther about steps the Union and MTA needed to take to negotiate a CBA. Arini did not, however, receive a response from MTA. When Sobran failed to respond to a subsequent written request to bargain, the Union filed an unfair labor practice charge with the NLRB. In January 2011, MTA entered into a settlement with the Union and, between January 2011 and May 2011, the parties participated in bargaining sessions without reaching an agreement.

After the parties' last bargaining session in May 2011, another entity took over management of the Temple. The Union held one bargaining session with that entity in January 2012, but a lease dispute involving the entity precluded further negotiations. In November 2012, the entity ended its association with MTA. Shortly thereafter, MTA put the Temple's operation under its for-profit business arm, 450 Temple, and the Temple's bargaining unit employees became employees of 450 Temple.

From late 2012 until January 2015, Arini made several attempts to schedule bargaining sessions with the Companies, leaving messages for Sobran with either Sobran's receptionist or Genther. On January 13, 2015, Arini was finally able to speak with Sobran. According to Arini's testimony, during this conversation, he told Sobran that the parties needed to negotiate a CBA. When Sobran replied that the Companies would never again be a union employer because Michigan was a right-to-work state, Arini threatened to file an unfair labor practice charge and Sobran hung up the phone. Sobran, however, testified that he did not tell Arini he was unwilling to bargain.

Three days later, the Union filed a charge with the NLRB alleging that the Companies failed to bargain with the Union in good faith. A hearing was conducted before an administrative law judge ("ALJ"), who found that the Companies engaged in unfair labor practices and ordered them to cease and desist from refusing to bargain with the Union and to

post a notice of the decision. On November 29, 2016, the NLRB affirmed the ALJ's findings and adopted the recommended order with modifications. This petition for enforcement followed.

Before this court, the Companies contend that (1) the Union's unfair labor practice charge was untimely filed, and (2) the Companies had no duty to recognize or bargain with the Union because the Union had lost majority support.

"This court has jurisdiction over petitions to review or enforce orders issued by the NLRB." *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 752 (6th Cir. 2003) (citing 29 U.S.C. § 160(e)). "We 'review [ ] the factual determinations made by the NLRB under the substantial evidence standard.'" *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 400 (6th Cir. 2017) (quoting *NLRB v. Local 334, Laborers Int'l Union*, 481 F.3d 875, 878–79 (6th Cir. 2007)). "The deferential substantial evidence standard requires this court to uphold the NLRB's factual determinations if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Local 334*, 481 F.3d at 879). "When there is a conflict in the testimony, 'it is the Board's function to resolve questions of fact and credibility,' and thus this court ordinarily will not disturb credibility evaluations by an ALJ who observed the witnesses' demeanor." *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 295 (6th Cir. 1985) (quoting *NLRB v. Baja's Place*, 733 F.2d 416, 421 (6th Cir. 1984)). "We review the NLRB's application of the law to facts under the substantial evidence standard. We review the NLRB's legal conclusions de novo; however, we defer to the NLRB's reasonable interpretation of the National Labor Relations Act." *Alt. Entm't, Inc.*, 858 F.3d at 400 (citation omitted).

Timeliness. Section 10(b) of the Act provides that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge." 28 U.S.C. § 160(b). "[T]he Section 10(b) period 'begins to run at the time an employee receives unequivocal notice of an adverse employment action rather than the time that action becomes effective.'" *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 899 (6th Cir. 1996) (quoting *Armco, Inc. v. NLRB*, 832 F.2d 357, 362 (6th Cir. 1987)). "The defendant bears the burden of establishing that a charging party received such notice." *Id.* "[T]he date upon which the alleged violation of the [Act] occurred represents a factual finding and, as such, is conclusive 'if

supported by substantial evidence on the record considered as a whole.'" *Id.* (quoting *Vemco, Inc. v. NLRB*, 79 F.3d 526, 528 (6th Cir. 1996)).

The Companies do not dispute that, on January 13, 2015, Sobran told Arini that the Companies would no longer bargain with the Union. Rather, the Companies argue that the Union had received prior notice of the Companies' refusal to bargain when the parties entered into the January 2011 settlement agreement. Both the ALJ and the NLRB rejected this argument. The NLRB explained, "[a]lthough the Respondents had failed to respond to the Union's repeated demands to negotiate a new collective-bargaining agreement, they continued to remit dues and medical and insurance payments to the Union until May 2014. Moreover, it was not until January 13, 2015, that the Respondents clearly and unequivocally informed the Union that they would not recognize or bargain with it because there were no longer any union members in the bargaining unit." Because substantial evidence supports these findings, the NLRB properly concluded that the Union's claim was not time-barred under § 10(b) of the Act.

Majority Status. "In order to comply with Section 8(a)(5) of the Act, an employer may only withdraw recognition 'where the union has actually lost the support of the majority of the bargaining unit employees.'" *Vanguard Fire & Supply Co., Inc. v. NLRB*, 468 F.3d 952, 957 (6th Cir. 2006) (quoting *Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB No. 105, at *2 (2001)). "To prove an actual lack of majority support, the employer must make a numerical showing that a majority of employees opposed the union as of the date that union recognition was withdrawn." *Pleasantview Nursing Home, Inc.*, 351 F.3d at 763 (quoting *NLRB v. Hollaender Mfg. Co.*, 942 F.2d 321, 325 (6th Cir. 1991)). As the ALJ explained, "The only 'evidence' Respondents present[ed] to support its argument that the Union lost its majority status is Sobran's testimony that after [a full-time bargaining unit employee] resigned, none of the remaining workers told him that they were currently or wanted to be union members." However, "[t]he issue of majority support turns on whether most unit employees wish to have union representation, not on whether most unit employees are members of a particular union." *In re Trans-Lux Midwest Corp.*, 335 NLRB No. 22, at *4 (2001). Under these circumstances, the NLRB properly rejected the Companies' proffered reason for withdrawal of recognition.

Accordingly, we **GRANT** the petition for enforcement.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk